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No. 80-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,

Appellant,

against

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
Interest of *Amicus Curiae*	1
Summary of Argument	3
ARGUMENT	
POINT I—The Illinois Act is not preempted by the Williams Act	4
A. The Provision for State Substantive Review	6
B. The Potential for Delay	9
POINT II—The Illinois Act is valid under the Commerce Clause	12
A. The Illinois Act Evenhandedly Vindicates Legitimate Local Public Interests	14
B. The Local Benefits Outweigh Any Incidental Burden on Commerce	17
POINT III—The governance of corporations within their jurisdiction is a traditional area of State regulation which must be preserved	21
Conclusion	26

TABLE OF AUTHORITIES

Cases:

AMCA Int'l Corp. v. *Krouse*, 482 F. Supp. 929 (S.D. Ohio 1979) 12, 15, 16, 17, 20, 21

Burks v. *Lasker*, 441 U.S. 471 (1979) 15, 17

Cort v. *Ash*, 422 U.S. 66 (1975) 15, 17, 19

PAGE

Curtiss-Wright Corp. v. *Kennecott Corp.*, [Current] Fed.Sec.L.Rep. para. 97,803 (CCH) (S.D.N.Y. 1980) 20

DeCanas v. *Bica*, 424 U.S. 351 (1976) 11, 12

Fleming v. *Nestor*, 363 U.S. 603 (1960) 13

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 6, 26

Great Western Corp. v. *Kidwell*, 577 F.2d 1256, rev'd on venue grounds *sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 .....8, 9, 21

Hall v. *Geiger-Jones Co.*, 242 U.S. 539 (1917) 13

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 6

Hi-Shear Industries, Inc. v. *Neiditz*, [Current] Fed. Sec.L.Rep. (CCH) para. 97,805 (D.Conn. 1980) .. 13

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) 13

Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) 22

Huron Cement Co. v. *Detroit*, 362 U.S. 440 (1960) .. 19

Jones v. *Rath Packing Co.*, 430 U.S. 519 (1977) 6

Kassel v. *Consolidated Freightways Corp.*, —— U.S. ——, 101 S.Ct. ——, 67 L.Ed.2d 580 (1981) ...17, 21, 22

Leroy v. *Great Western United Corp.*, 443 U.S. 173 (1979) 5, 12, 13, 21

Lewis v. *BT Investment Managers, Inc.*, —— U.S. ——, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980) 12

McDonald v. *Board of Elections Comrs.*, 394 U.S. 802 (1969) 13

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Ware*, 414 U.S. 117 (1973) 12, 24

Minnesota v. *Clover Leaf Creamery Co.*, —— U.S. ——' —— 101 S.Ct. ——, 66 L.Ed.2d 659 (1981) 19

PAGE

Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) ..13, 14, 17

Piper v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) 7, 10, 12, 21

Ray v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978) .. 24

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429 (1978) 12, 13, 14, 19

Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462 (1977) 15, 17

Sharon Steel Corp. v. *Whaland*, —— N.H. ——, No. 80-333 (Sup.Ct.N.H. July 2, 1981) 10, 13, 15

Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963) 24

South Carolina Highway Department v. *Barnwell Bros.*, 303 U.S. 177 (1938) 13

Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 19

Strode v. *Esmark, Inc.* [Current] Fed. Sec.L.Rep. (CCH) para. 97,538 (Ky.Cir.Ct. May 13, 1980) ..15, 20

Telvest, Inc. v. *Bradshaw*, 618 F.2d 1029 (4th Cir. 1980) 13

United States v. *Vuitch*, 401 U.S. 62 (1971) 13

Zahn v. *Transamerican Corp.*, 162 F.2d 36 (3rd Cir. 1947) 16

United States Constitution:

Art. I, Sec. 8, Cl. 3 (Commerce Clause) 3, 12

Art. VI, Cl. 2 (Supremacy Clause) 3

Statutes:

Bank Holding Company Act, 12 U.S.C. § 1842 9

§ 1842(c) 8

PAGE

Federal Communications Act, 47 U.S.C. § 310 9
§ 310(d) 8

Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* Section 28(a), 15 U.S.C. § 78bb(a) 2, 5

Williams Act, Pub.L.No. 90-439, 82 Stat. 454 (15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) 2

15 U.S.S. § 77n(e) 18

Illinois Business Take-Over Act, Ill. Ann. Stat. ch. 121 1/2, § 137.51 *et seq.* (Smith-Hurd Cum.Supp. 1980) 1, 2, 10, 17, 18, 22
§ 137.51-1 .....10, 17, 18
§ 137.52-4 14
§ 137.52-5 14
§ 137.52-9 14
§ 137.52-10 14
§ 137.53 20
§ 137.54 18
§ 137.54(C) 18
§ 137.54(D) 18
§ 137.54(E) 2
§ 137.55 14
§ 137.57(A) 17
§ 137.57(E) 6, 7, 16, 17
§ 137.58 ..... 8, 14
§ 137.59(B) 2
§ 137.60(C) 14

New York Security Takeover Disclosure Act, N.Y. Bus. Corp. Law Article 16, § 1600 *et seq.* (McKinney's) 1, 22
§ 1604 ..... 3, 25
§ 1605 ..... 3, 25
§ 1614 3

PAGE

New York Bus. Corp. Law
§ 510 19
§ 623(k) 19
§ 624 19
§ 626 19

State Takeover Statutes 22

Rules:

Securities Exchange Act Rule 14d-2(b), 17 C.F.R.
§ 240.14d-2 12
-2(b) 2

Securities Exchange Act Rule 14e-1, 17 C.F.R.
§ 240.14e-1 11

Treatises:

Chatlos, *The SEC vs. Investors on Tender Offers*, 56 Harv. Bus. Rev. 6 (Sept.-Oct. 1978) 11, 21

Is the Takeover Game About to End? 150 Financial World 59 (March 15, 1981) 11

Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U. L. Rev. 872 (1978) 11, 16

Shipman, *Some Thoughts About the Role of State Takeover Legislaiton: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722 (1970) 16

Miscellaneous:

44 Fed. Reg. 70,326 (1979) 2

44 Fed. Reg. 70,330 (1979) 8

S. Rep. No. 550, 90th Cong., 1st Sess. (1967) .. 16

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

The State of New York has a significant interest in the issues presented by this appeal since the decision of this Court may affect the validity of the New York Security Takeover Disclosure Act, New York Business Corporation Law ("N.Y.B.C.L.") Article 16, § 1600, *et seq.* (McKinney's) (the "New York Act").

The New York Act is similar in purpose to the Illinois statute that is challenged in the case at bar, Illinois Business Takeover Act, Ill. Ann. Stat. ch. 121 ½, §§ 137.51 *et seq.* (Smith-Hurd Cum. Supp. 1980) (the "Illinois Act"),

in that both Acts serve to provide investors with full and fair disclosure in connection with a tender offer. There are, however, substantial differences in the two Acts. For example, the Illinois Act contains several provisions that are not embodied in the New York Act, including a twenty business day pre-offer filing requirement, Ill. Ann. Stat. ch. 121 1/2, § 137.54(E) (Smith-Hurd); a requirement that the offer remain open for twenty days, Ill. Ann. Stat. ch. 121 1/2, § 137.59(B) (Smith-Hurd); and a provision allowing the State to deny the registration of the takeover offer or condition its registration if the State determines the takeover offer is, *inter alia*, inequitable, Ill. Ann. Stat., ch. 121 1/2, § 137.54(E) (Smith-Hurd).

Congress first entered the field of tender offers in 1968 when it amended the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* by enacting the Williams Act, Pub. L. No. 90-439, 82 Stat. 454, codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f). In 1979, pursuant to its rule-making authority under the Securities Exchange Act and the Williams Act, the Securities and Exchange Commission (the "S.E.C.") promulgated rules that apply to certain tender offers. Securities Exchange Act Release No. 16384, 44 Fed Reg. 70,326 (1979). Among those rules recently promulgated is Rule 14d-2(b), 17 C.F.R. § 240.14d-2(b), which provides that a public announcement of a tender offer constitutes the commencement of a tender offer and that the offeror must, within five days of such public announcement, either withdraw the offer or disseminate certain information to security holders, which date of dissemination is then deemed the date of commencement.*

One Rule 14d-2(b) became effective in 1980 the time frames contained in the state statutes no longer corresponded to those in the federal statute. In 1980 New

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* Since this rule was promulgated subsequent to the tender offer in the instant case, the rule is not applicable to the facts herein.

York amended its takeover statute, *inter alia*, to conform to the new S.E.C. rules. Among those revisions to the New oYrk Act was the deletion of the pre-commencement filing period, L. 1980, ch. 733, § 2,* with the result that the New York Act was the deleiton of the pre-commencement in concert.

The State of New York has an interest in protecting the validity of its statute. The State of New York strongly believes in the need for state takeover statutes and is satisfied that the New York Act is valid under the Commerce and Supremacy Clauses of the United States Constitution.

The State of New York also supports the constitutionality of the Illinois Act.

Summary of Argument

The Ilinois Act does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Williams Act, hence is not preempted. Even assuming that the Illinois Act regulates questions of substantive fairness in tender offers, such regulation is consistent with Congressional enactments. Any incidental delay which may result from the Illinois Act enures to the benefit of investors and is therefore consistent with Congressional objectives with respect to the Williams Act.

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* The 1980 amendments also deleted the "friendly offer" exemption, L. 1980, ch. 733, § 1 and the Attorney General's authority to halt the continuation of a tender offer or its commencement, L. 1980, ch. 733, § 2. The amendments further added N.Y.B.C. L. § 1614, L. 1980, ch. 733, § 3, commonly referred to as the "comity" provision, which authorizes the Attorney General to defer the filing of the registration statement (and administrative review) to a sister state having a greater interest than New York in regulating the tender offer when the target company is not organized under the laws of New York. Additional limitations placed upon the Attorney General include reductions in the amount of time in which he must complete his review. N.Y.B.C.L. §§ 1604, 1605; L. 1980, ch. 733, § 2.

Congress has specifically permitted state regulation of tender offers.

Two legitimate local public interests are furthered by the Illinois Act since a tender offer involves two kinds of transactions. A tender offer is on the one hand an internal corporate affairs transaction, which is traditionally governed at the state level, and on the other hand, a securities transaction, which is traditionally governed at both the state and federal levels. In effectuating both of these interests in the regulation of tender offers, Illinois is concerned with the protection of Illinois shareholders. The benefits conferred on shareholders by the Illinois Act clearly outweigh any alleged burdens of compliance with the Illinois Act.

The decision of this Court should acknowledge the efforts of states such as New York to harmonize their statutes with the federal law regulating tender offers. If this Court finds any provision of the Illinois Act to be in conflict with the Williams Act, it should limit its decision in order to preserve those portions of the state statutes which are constitutional and which complement the federal regulatory scheme.

ARGUMENT

POINT I

The Illinois Act is not preempted by the Williams Act.

The Court of Appeals based its conclusion that the Illinois Act is preempted by the Williams Act on its interpretation of the Congressional intent underlying the Williams Act:

> We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight,

based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lengthy prenotification delay, a requirement Congress specifically rejected. 633 F. 2d 498-9.

It is submitted, however, that the Court of Appeals erred in its conclusion because it misinterpreted the intent of Congress in enacting the Williams Act and misconstrued the effect the Illinois Act would have on a tender offer.

The *amicus* agrees with the Court of Appeals that Congress has neither expressly barred the states from regulating tender offers, nor enacted so pervasive a regulation that implicit preemption may be inferred. 633 F. 2d 491. Congress has declared that states may regulate tender offers provided that such regulation is not in conflict with the Williams Act. Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a).* Where there is no explicit or implicit

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* Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person *insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.* (Emphasis added.)

This Court has held that "section [28(a)] was plainly intended to protect, rather than limit, state authority." *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 182 (1979).

preemption, the Illinois Act must be upheld absent a showing that it is in conflict with the Williams Act:

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'
>
> *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-526 (1977).

See, *Hines* v. *Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963).

The Illinois Act does not conflict with the Williams Act. Nor is it an obstacle to the execution of Congressional objectives.

A. The Provision for State Substantive Review

The Court of Appeals found Ill. Ann. Stat. ch. 121 1/2, § 137.57 (E) (Smith-Hurd) to be "the most troublesome portion of the Illinois Act." 633 F. 2d 493. That Section provides that the Illinois Secretary of State shall deny the registration of a take-over offer, or condition the registration on changes or modification, if he finds that:

> . . . the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees, or that the take-over offer will not be made to all offerees in this

> State on substantially equal terms, or that the take-over offer would violate this Act. . . .
>
> Ill. Ann. Stat. ch. 121 1/2, § 137.57 (E) (Smith-Hurd).

Despite the State's declaration that this section does not mean it would rule on the substantive fairness of the offer,* the Court of Appeals held that

> the Illinois Act thus empowers the Secretary of State to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, he judges the offer 'inequitable.'
>
> 633 F. 2d 493.

Assuming, *arguendo*, that the Illinois statute provides for substantive review of the fairness of the tender offer, such review is not preempted by the Williams Act, which is consistent with regulatory statutes.

The legislative history of the Williams Act** shows that it was intended to provide an evenhanded opportunity to the offeror and target company to present their case. As

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* The Brief for Defendant Alan J. Dixon submitted to the Court of Appeals stated, at page 17:

> The district court also concluded that as the Illinois Act authorized the Secretary of State to deny registration to an offer that he finds to be inequitable, this varies from the market approach in the Williams Act. (S.H.A. ch. 121 1/2, § 137.57(E)). *The duty of the Secretary to review an offer to see if it fails to provide full disclosure of material information or is inequitable or would work a fraud or deceit, should not be construed as meaning that the Secretary would judge the substantive fairness of e.g., the amount of the offer.* The pre-offer filing and hearing provisions of the Illinois Act are not inconsistent with a market approach by allowing for review by a neutral state administrator, while the security-holders have time to consider the offer. (Emphasis added).

** See *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977) for a discussion of the legislative history of the Williams Act.

stated by the Court of Appeals for the Fifth Circuit:

> The underlying purpose of the Williams Act is to protect investors. *Piper* v. *Chris-Craft Industries, Inc.*, 1977, 430 U.S. 1, 97 S. Ct. 926, 51 L.Ed.2d 124. Congress chose this goal in the Williams Act and adopted a distinct means of achieving it. Essentially, Congress relied upon a 'market approach' to investor protection. The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then to let the investor decide for himself.
>
> *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 at 1276 (5th Cir. 1978) *reversed on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 433 U.S. 173 (1979).

However, nothing in the Williams Act, or its "market approach," *supra*, nullifies requirements for regulatory approval in connection with tender offers. The market approach merely allows all sides to a tender offer to present their views to the shareholders, who can then decide for themselves. When regulatory approval is required in a tender offer, such requirement is one of the factors to be disclosed to investors.

In adopting new rules pursuant to the Williams Act, the S.E.C. recognized that regulatory approval may be required in connection with tender offers. 44 Fed. Reg. 70,330 (1979). The S.E.C. specifically referred to regulation in the banking and communications fields. *Id.* at fn. 17. Certainly banking regulations which inquire into the convenience and needs of the community to be served, 12 U.S.C. § 1842(c), or broadcast license regulations considering the public interest, convenience and necessity, 47 U.S.C. § 310(d), could not coincide with the Williams Act if the Court of Appeals' analysis of the market approach were correct.

The Court of Appeals, in holding the Illinois Act preempted, stated:

> The state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress. Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice. Thus, to the extent that Illinois has chosen to rely upon its Secretary of State's judgment rather than upon investors' own judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional. *Cf. Kidwell, supra* at 1279.
>
> 633 F.2d 494.

As indicated above, this analysis is faulty since it fails to consider that when regulatory approval is required in a tender offer context, the regulator's judgment will have an impact on the tender offer. Congress, with the enactment of the Williams Act, did not nullify the Federal Communications Act, 47 U.S.C. § 310, or the Bank Holding Company Act, 12 U.S.C. § 1842, which Acts scrutinize the substantive merits of the transfer of control in a tender offer. Neither did Congress preempt the Illinois Act which contains provisions for regulatory review.

B. The Potenital for Delay

The Court of Appeals criticized the Illinois hearing provisions because they could be triggered by private parties and because they can provide a delay which would stand as an obstacle to the objectives of the Williams Act, which the court stated requires a neutral balance.* 633 F.2d at

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*The Illinois Act, which must be interpreted in a manner that does not favor either the offeror or the target company man-

(footnote continued on following page)

495. According to the Court of Appeals, if the balance is tipped in favor of incumbent management, tender offers will be impaired, thereby denying shareholders the right to tender their shares at a premium. 633 F.2d 496.

The Court concluded that inasmuch as the Illinois Act provides the potential for excessive delay, that Act must fall because Congress did not intend lengthy delays in tender offers. *Id.* at 499.

However, the record is devoid of any actual effect the Illinois Act may have on tender offers, *Id.* at 497. Moreover, there is substantial evidence that the various state takeover statutes have not precluded a market approach to tender offers, have not deterred offerors from making tender offers and have not prevented target companies from being acquired. *Sharon Steel Corp.* v. *Whaland*, —— N.H. ——, No. 80-333 at 14 (Sup. Ct. N.H. July 2, 1981).

Although the Court of Appeals was aware that extending the offering period in tender offers has the effect of creating an "auction market," thereby yielding larger

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(footnote continued from preceding page)

agement, is neutral. Ill. Ann. Stat. ch. 121 1/2 § 137.51-1 (Smith-Hurd) (Findings and Purpose) states:

> In recent years numerous companies have been subjected to take over offers in which equity securities were acquired suddenly by means of tender offers. Many of these tender offers have been made without advance notice and without giving securityholders of the acquired company adequate time to consider the offer and without giving management of the acquired company adequate time to evaluate alternatives so that they might recommend a course of action that would be in the best interests of all securityholders. The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers *and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.* (Emphasis added)

See, *Piper* v. *Chris-Craft Industries, Inc., supra,* 430 U.S. at 29-30 (1977).

premiums to investors, the court, in the absence of any data to the contrary, held that delay harms investors and thereby frustrates the Williams Act. 633 F.2d 497-8. *But see,* Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U. L. Rev. 872 (1978) (hereinafter, *"A Response to Great Western"*) (the state takeover statutes enhance, rather than disturb, neutrality).

If the Court of Appeals is correct that the intent of Congress was to provide shareholders with a premium over the market price, 633 F.2d 497, clearly state statutes which have had the incidental effect of raising even those premiums must, following the Court of Appeals' reasoning, be found to parallel Congressional intent with respect to the Williams Act. Indeed, studies demonstrate that during the period between 1974 and 1980, taking all competitive hostile takeover bids into consideration, shareholders reaped $1.7 billion more for their shares in premiums over the original tender offer price (rather than the lower market price), which premiums are attributable to extended time periods under state takeover laws. *E.g., Is the Takeover Game About to End?,* 150 Financial World 59-60 (March 15, 1981); Chatlos, *The SEC vs. Investors on Tender Offers,* 56 Harv. Bus. Rev. 6-8 (Sept.-Oct. 1978).

The Court of Appeals was aware that the S.E.C., by promulgating, in 1979, 17 C.F.R. § 240.14e-1, extended the minimum offering period in tender offers to 20 business days. 633 F.2d 499 fn 25. Nevertheless, in finding that the Illinois Act delays offers in excess of the minimum period in the Williams Act, the Court of Appeals referred to legislative history indicating a ten day Williams Act waiting period. 633 F.2d 498.

Although a pre-offer period was considered by Congress and rejected, 633 F.2d 497 fn 23, such rejection does not justify an inference of Congressional intention to preempt state statutes containing such provisions. *DeCanas* v.

Bica, 424 U.S. 351, 360 fn. 8 (1976). S.E.C. rule 17 C.F.R. § 240.14d-2, providing an apparent conflict with the Illinois pre-offer filing, was not promulgated until after the tender offer in the instant case. In any event, such periods serve to benefit investors. *AMCA Int'l Corp.* v. *Krouse*, 482 F. Supp. 929, 940 (S.D. Ohio 1979).

The *amicus* submits that the Court of Appeals erred in finding that delays beyond those enunciated in the Williams Act are contrary to Congressional intent. Congress has determined in the securities area to protect state jurisdiction. *Leroy* v. *Great Western United Corp.*, *supra*, 443 U.S. at 182. It is clear that any delay in state tender offer laws serves to protect investors, the only beneficiaries of the Williams Act. *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, 430 U.S. 1. Therefore such delay cannot frustrate the effectuation of Congressional policy to protect investors.

POINT II

The Illinois Act is valid under the Commerce Clause.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several states . . ." U.S. Const., Art. 1, § 8, cl. 3. It has long been established, however, that "the National Government's power, under the Commerce Clause, to regulate commerce does not exclude all state power of regulation." *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 140 (1973). Indeed, the States ". . . retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Lewis* v. *BT Investment Managers, Inc.*, —— U.S. ——, ——, 100 S. Ct. 2009, 2015, 64 L.Ed.2d 702, 711 (1980); *Raymond Motor Transporation, Inc.* v. *Rice*, 434 U.S. 429, 440 (1978).

Congress has long recognized the role of states in securities regulation and tangible evidence of this is discussed *ante*, at page 5 with reference to preemption. *See, Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 552 (1917); *Leroy* v. *Great Western United Corp., supra*, 443 U.S. at 182; *Telvest, Inc.* v. *Bradshaw*, 618 F.2d 1029, 1035 (4th Cir. 1980); *Hi-Shear Industries, Inc.* v. *Neiditz*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,805 (D. Conn. 1980).

Regularly enacted state statutes are presumed to be valid, *McDonald* v. *Board of Election Comrs.*, 394 U.S. 802, 809 (1969); *Fleming* v. *Nestor*, 363 U.S. 603, 617 (1960), and absent a clear showing of unconstitutionality, should be construed so as to uphold their constitutionality. *United States* v. *Vuitch*, 401 U.S. 62, 71 (1971). This presumption perforce attaches to statutes alleged to violate the Commerce Clause. *See, Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1976); *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U.S. 177, 190-191 (1938). The Court below relied on mere speculation to strike down the Illinois Act as violative of the Commerce Clause; and since no clear showing of unconstitutionality has been advanced, the Illinois Act should be upheld. *See, Sharon Steel Corp.* v. *Whaland, supra*, No. 80-333 at 14.

The prevailing rule for determining the constitutionality of a state statute affecting interstate commerce was stated by this Court in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

In *Raymond Motor Transportation, Inc.* v. *Rice, supra*, the Court recognized that application of the test must be on a case-by-case basis:

> . . . experience teaches that no single conceptual

> approach identifies all of the factors that may bear on a particular case. Our recent decisions make clear that the inquiry necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.
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> 434 U.S. at 441. (footnote omitted.)

Applying the principles enunciated in *Pike* to the instant case, it is indisputable that the Illinois Act is valid under the Commerce Clause.

A. The Illinois Act Evenhandedly Vindicates Legitimate Local Public Interests

The Illinois Act guarantees equality of treatment for all shareholders of the target company; it makes no distinction between shareholders within and without the State. Ill. Ann. Stat. ch. 121 1/2, § 137.52-4 (Smith-Hurd). The Illinois Act applies to Illinois and foreign offerors alike. Ill. Ann. Stat. ch. 121 1/2, § 137.52-5 (Smith-Hurd). The Act not only regulates the activities of the offeror; it also regulates the activities of the target. Ill. Ann. Stat. ch. 121 1/2 §§ 137.55, 137.58, 137.60(C) (Smith-Hurd). It is patent that the Illinois Act is evenhanded.

Two local interests are furthered by the Illinois Act. First, Illinois has an interest in regulating the internal affairs of corporations incorporated in Illinois and operating under Illinois law,* which is traditionally a proper

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* The Illinois Act applies to an offer to acquire or the acquisition of any equity security of a target company pursuant to a tender offer, Ill. Ann. Stat. ch. 121 1/2, § 137.52-9 (Smith-Hurd), and a target company is defined to mean a corporation (1) of which 10% of the outstanding securities is held of record by Illinois security holders, or (2) that meets any two of the following conditions: (a) has its principal executive office in Illinois; (b) is organized under the laws of Illinois; (c) has at least 10% of its stated capital and paid-in surplus represented in Illinois. Ill. Ann. Stat. ch. 121 1/2, § 137.52-10 (Smith-Hurd).

subject of state regulation. *See, Burks* v. *Lasker*, 441 U.S. 471, 478 (1979); *Cort* v. *Ash*, 422 U.S. 66, 84 (1975). In *Santa Fe Industries* v. *Green*, 430 U.S. 462, 479 (1977) this Court stated:

> Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overriden. As the Court stated in *Cort* v. *Ash, supra:* 'Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law *expressly* requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.' 422 U.S. at 84. (Emphasis added.)

A tender offer involves a transfer of corporate control; that is, after all, the very reason why the offeror makes the bid. It is manifest that states have a legitimate local interest in regulating the transfer of corporate control since corporations are creatures of the state. *Cort* v. *Ash, supra*, 422 U.S. at 84. States therefore have a decided interest in regulating tender offers. *Sharon Steel Corp.* v. *Whaland, supra*, No. 80-333 at 14-15; *AMCA Int'l Corp.* v. *Krouse, supra*, 482 F. Supp. at 939; *Strode* v. *Esmark*, [1980] Fed. Sec. L. Rep. (CCH) ¶ 97,538, at 97,808. (Ky. Cir. Ct. May 13, 1980).

A tender offer is not merely the sale of stock by one investor to another. If that were so, the transaction could be effected through a national securities exchange or over-the-counter market. Indeed, in enacting the Williams Act, Congress recognized that something more than the sale of stock is involved. *E.g., Senate Comm. on Banking and Currency, Full Disclosure of Corporate Equity Ownership*

and in Corporate Takeover Bids, S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967). A tender offer contemplates obtaining enough voting stock to effectuate whatever purposes the offeror has in taking over the target company. With the takeover inevitably come a new board of directors, new management, dilution in voting power, and a merger into the offeror. Traditionally, these are subjects of state regulation. *See, e.g., Zahn* v. *Transamerican Corp.,* 162 F.2d 36, 45-46 (3rd Cir. 1947).

Thus, unless a shareholder tenders his stock, he necessarily becomes a minority shareholder in a new entity with new management and new control. The tender offer therefore alters the fundamental character of the corporation, much like a proxy contest or a merger. A tender offer is clearly a transaction involving the internal affairs of a corporation, and as such is properly the subject of state regulation. *AMCA Int'l. Corp.* v. *Krouse, supra,* 482 F. Supp. at 939; *see,* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act,* 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra,* 53 N.Y.U. L. Rev. at 914-15.

In the case at bar, the target company is incorporated under the laws of Illinois, has its principal executive offices in Illinois, and has a substantial number of Illinois shareholders holding a substantial amount of its shares. Every aspect of the target company's existence, including the transfer of its stock, is governed by the laws of Illinois. All shareholders of the target company hold their stock subject to Illinois law. Illinois, therefore, has a legitimate interest in regulating this tender offer.

The second local public interest furthered by the Illinois Act is the protection of shareholders by requiring that the offeror provide to offerees full and fair disclosure of all material information concerning the takeover. Ill. Ann. Stat. ch. 121 1/2, § 137.57(E) (Smith-Hurd). The

stated purpose of the Illinois Act is to "protect the interests of Illinois securityholders." Ill. Ann. Stat. ch. 121 1/2, § 137.51-1 (Smith-Hurd). It is beyond question that the protection of shareholders is a legitimate state interest, as the Court below recognized. 633 F.2d at 500; *See, AMCA Int'l Corp.* v. *Krouse, supra,* 482 F. Supp. at 939; *Burks* v. *Lasker, supra,* 441 U.S. at 478; *Cort* v. *Ash, supra,* 422 U.S. at 84; *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 479.

Thus, the Illinois Act vindicates two legitimate local public interests: regulation of the internal affairs of its corporations, which is traditionally a matter for state regulation, and protection of investors, which has traditionally been shared by both federal and state regulators.

B. The Local Benefits Outweigh Any Incidental Burden on Commerce

The Illinois Act does not impose any burden on commerce that is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra,* 397 U.S. at 142. This Court has recently stated, ". . . the Commerce Clause does not invalidate state legislation simply because the legislation burdens interstate commerce." *Kassel* v. *Consolidated Freightways Corp. of Delaware,* —— U.S. ——, ——, 101 St.Ct. ——, ——, 67 L.Ed.2d 580, 599 (1981). Any extraterritorial effects are only incidental; they do not cause interstate disruption.

The Illinois Act imposes relatively minor burdens on interstate commerce. While the Act does empower the state to hold hearings, Ill. Ann. Stat. ch. 121 1/2, § 137.57(A) (Smith-Hurd), and even to deny registration of an offer, Ill. Ann. Stat. ch. 121 1/2, § 137.57(E) (Smith-Hurd), the basis for such action would be protection of offerees—i.e., to determine whether they had received full and fair disclosure. To ensure that all offerees—not just Illinois offerees—receive full and fair disclosure imposes

no excessive burden on interstate commerce. Indeed, this merely parallels and helps to accomplish the exact purpose of the Williams Act, § 14(e), 15 U.S.C. § 77n(e).

The information that is required to be prepared by the Illinois Act is substantially the same as that required to be prepared by the Williams Act. Ill. Ann. Stat. ch. 121 1/2, § 137.54(C) (Smith-Hurd). In fact, Illinois will accept, in lieu of the Illinois registration statement, "a registration statement form or other filing required by a federal or state government agency . . . which . . . encompass[es] disclosure requirements substantially equivalent to those contained in subsection c of this Section." Ill. Ann. Stat. ch. 121 1/2, § 137.54(D) (Smith-Hurd). Also, while the Illinois Act requires registration, such process must be administered "without unduly impeding take-over offers." Ill . Ann. Stat. ch. 121 1/2, § 137.51-1 (Smith-Hurd).

It is important to distinguish between burdens imposed on commerce and burdens imposed on a particular offeror. This Court is concerned only with possible burdens on commerce. The filing of a registration statement by the offeror is not a burden on commerce.

The assumption that the Illinois Act unduly burdens commerce is based entirely on conjecture. The Court below speculates that had Illinois not been enjoined, "over 23 million dollars [the purchase price] of interstate commerce would presumably have been affected." 633 F.2d at 502. The Act does not necessarily prevent the flow of money in commerce. The Act merely mandates the registration of an offer, Ill. Ann. Stat. ch. 121 1/2, § 137.54 (Smith-Hurd), but the offeror in the instant case refused even to file a registration statement. It is not an excessive burden on commerce for the State of Illinois to require a registration statement in order to protect shareholders before the flow of money begins.

All aspects of corporate existence with respect to shareholders, residents and non-residents alike, are governed by the laws of the state of incorporation, yet it cannot seriously be argued that such laws unconstitutionally burden interstate commerce. For example, shareholders of New York corporations look to the New York Business Corporation Law for their rights, be they appraisal rights, voting rights, preemptive rights, or rights with respect to corporate control, be it a merger, a consolidation, a takeover bid, or a major asset sale.

In purchasing shares of a corporation, the purchaser consents to be governed by laws of the state of incorporation. For example, any shareholder of a New York corporation, no matter what his state of residence, is both limited and protected by various provisions of New York law, e.g., N.Y.B.C.L. § 623(k) (appraisal rights), § 624 (access to corporate records), § 626 (right to bring a derivative suit), and § 510 (dividend rights). New York law reaches all shareholders of New York corporations, whether they are resident or non-resident shareholders, to effectuate New York's interest in regulating corporations created by its statutes. *Cort* v. *Ash, supra,* 422 U.S. at 84. In like fashion, shareholders of Illinois corporations are governed by Illinois law.

That state legislation may have an extra-territorial effect does not by itself vitiate such legislation under the *Pike* test. *Minnesota* v. *Clover Leaf Creamery Co.,* —— U.S. ——, ——, 101 S.Ct. ——, ——, 66 L.Ed.2d 659, 674-5 (1981); *Raymond Motor Transportation, Inc.* v. *Rice, supra,* 434 U.S. 44; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1960); *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 770 (1945). In the instant case, the fact that the protection afforded to Illinois shareholders by the Illinois Act will also reach other shareholders is merely an incidental aspect of effective protection for Illinois residents. It is not an interference with interstate com-

merce. *AMCA Int'l Corp.* v. *Krouse, supra,* 482 F. Supp. at 939.

The fear expressed by the Court below that an excessive burden on commerce would result if states in addition to Illinois claim jurisdiction over a particular tender offer, 633 F.2d at 502, is unwarranted. The comity provision in the Illinois Act renders the registration provisions of the Act inapplicable where Illinois shareholders would be adequately protected by application of another state's takeover statute. Ill. Ann. Stat. ch. 121 1/2, § 137.53 (Smith-Hurd).

The Court below also speculates that the "potentially prolonged delay required by the Act may, in some circumstances at least, be detrimental to the interests of the shareholders." 633 F.2d at 502. But it has been found to be of particular benefit to the shareholder to have time to make an informed decision whether or not to tender his shares. In *Strode* v. *Esmark, Inc., supra,* ¶ 97,538 at 97,806, the Court stated:

> Indeed, the principal effect of state takeover statutes appears to be that they afford more time to the target and its shareholders to consider and respond to the offer. This additional time has often resulted in higher bids being offered to the target companies' shareholders either by the initial bidder or by a third party making a competing bid.

Hasty, ill-considered decision making is not a benefit to any shareholder. *Curtiss-Wright Corp.* v. *Kennecott Corp.* [Current] Fed. Sec. L. Rep. ¶ 97,803, at 90,026 (CCH) (S.D.N.Y. December 26, 1980).

The shareholders benefit in another way when the offer is open for a longer time. The dynamics involved in a tender offer are unlike those in any other transaction. The offeror makes its bid when and at a price it wants; and it stands to benefit if the offer moves forward at a gallop,

for the swift pace virtually precludes a competitor, who has not had the benefit of research, from making a competing bid. As such, the original offering price tends to be lower; there is neither competition from another bidder, nor incentive for the offeror to raise its price. Any prolonged offering period can only benefit the offerees.* Studies have shown that the price they are offered for their shares tends to increase the longer the offer is open because it enables competitive bids to enter the market place. *E.g.*, Chatlos, *The SEC vs. Investors on Tender Offers, supra*, 56 Harv. Bus. Rev. at 8; *see also, AMCA Int'l Corp.* v. *Krouse, supra*, 482 F. Supp. at 940.

It is not only the Illinois shareholders who benefit from a bidding contest or from additional disclosures; all shareholders benefit. Certainly that is not an excessive burden on commerce. It is evident that none of the incidental burdens on commerce exceed the benefits conferred by the Illinois Act, and the Commerce Clause is not violated.

POINT III

The governance of corporations within their jurisdiction is a traditional area of State regulation which must be preserved.

The legitimate and traditional interest of the states in the regulation of securities transactions and in the affairs of corporations within their jurisdiction must be preserved. As this Court has recently stated, "[A] State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassell* v. *Consolidated Freight-*

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* Indeed, nothing in the Williams Act or its market approach gives an offeror ". . . a right under the Williams Act to complete its tender offer successfully." *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1277 (5th Cir. 1978) *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), citing *Piper* v. *Chris-Craft Industries, Inc., supra*, 430 U.S. at 34-35.

ways, supra, —— U.S. at ——, 101 S. Ct. at ——, 67 L. Ed.2d at 586, citing *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 350 (1977). The change of control and ownership of a corporation which is the intended result of a public tender offer is just such a matter of traditional local concern.

The Illinois Act, just as the statutes of 35 other states* including that of New York, attempts to vindicate that local concern through legislation primarily intended to

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* Alaska Stat. §§ 45.57.010-.120 (Supp. 1978); Ark. Stat. Ann. §§ 67-1264 to -1264.14 (Supp. 1977); Colo. Rev. Stat. §§ 11-51.5 -101 to 108 (Supp. 1976); Conn. Gen. Stat. §§ 36-347a to -347m (1977); Del. Code Ann. tit. 8, § 203 (Supp. 1977); Ga. Code Ann. §§ 22-1907 to -1915 (1977); Hawaii Rev. Stat. §§ 417E-1 to -15 (1976); Idaho Code §§ 30-1501 to -1513 (Supp. 1978); Act of Sept. 8, 1977, Pub. Act 80-556, Ill. Ann. Stat. ch. 121 1/2, § 137.5-1 (Smith-Hurd Supp. 1978); Ind. Code Ann. §§ 23-2-3-1 to -12 (Burns Supp. 1978); Iowa Uniform Securities Act §§ 502.102, .211-215 (1978), reprinted in 1A Blue Sky L. Rep. (CCH) ¶¶ 18,142, 18,161-165; Kan. Stat. Ann. §§ 17-1276 to -1285 (1974); Ky. Rev. Stat. §§ 292.560-.991 (Supp. 1978); La. Rev. Stat. Ann. §§ 51:1500-:1512 (West Supp. 1978); Me. Rev. Stat. Ann. tit. 13, §§ 801-817 (Supp. 1978); Md. Corp. & Ass'ns Code Ann. §§ 11-901 to -908 (Supp. 1977); Mass. Ann. Laws ch. 110C, §§ 1-13 (Michie/Law. Co-op. Supp. 1978); Mich. Comp. Laws Ann. §§ 451.901-.917 (Supp. 1978); Minn. Stat. Ann. §§ 80B.01-.13 (West. Supp. 1977); Miss. Code Ann. §§ 75-72-1 to -23 (Supp. 1978); Mo. Take-Over Bid Disclosure Act, 1978 Mo. Laws S.B. No. 820, reprinted in 2 Blue Sky L. Rep. (CCH) ¶¶ 28, 201-214; Neb. Rev. Stat. §§ 21-2401 to -2417 (1977); Nev. Rev. Stat. §§ 78.376 to -.3778 (1973); N.H. Rev. Stat. Ann. §§ 421:A to :15 (1977); N.J. Stat. Ann. §§ 49:5-1 to -19 (West. Supp. 1978); N.Y. Bus. Corp. Law §§ 1600-1614 (McKinney Supp. 1980); N.C. Gen. Stat. §§ 78B-1 to -11 (Supp. 1977); Ohio Rev. Code Ann. § 1707.041 (Page 1978); 70 Pa. Cons. Stat. Ann. §§ 71-85 (Purdon Supp. 1978); S.D. Comp. Laws Ann. §§ 47-32-1 to -47 (Supp. 1978); Tenn. Code Ann. §§ 48-2101 to -2114 (Supp. 1978); Utah Code Ann. §§ 61-4-1 to -13 (1978); Va. Code §§ 13.1-528 to -541 (1978); Wis. Stat. Ann. §§ 552.01-.25 (West Special Pamphlet 1978); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, reprinted in 3 Blue Sky L. Rep. (CCH) ¶ 46,615.

ensure that the shareholders of a target company are given adequate information of all the material facts concerning a takeover bid as well as the time in which to use such facts, so that they can make a fully informed decision whether to tender their shares and potentially whether to turn over control of the target corporation to the tender offeror.

In considering the question of federal preemption, the Court below identified the "crucial inquiry" as "whether the Illinois Act differs from the Williams Act in such a way that achievement of the congressional objective of investor protection is frustrated" 633 F.2d at 493, and proceeded to an analysis of specific provisions of the Illinois Act. The Court found the "most troublesome portion of the Illinois Act" to be the provision contained in the hearings section of the Act which in effect empowers the Illinois Secretary of State to pass upon the substantive fairness of a tender offer. Thus, the Court held that, "*to the extent that* Illinois has chosen to rely upon its Secretary of States' judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional." 633 F.2d 494. (Emphasis added.)

Moreover, with respect to the question of whether certain delays, such as the pre-effective notification period, which are built into the Illinois statute are unacceptable on preemption grounds, the Court held that the Illinois Act "contained mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress . . ." *Id.* at 498.

The Court's analysis thus appropriately focused on specific provisions of the Illinois Act which appeared to it to be in conflict with the "congressional judgment and analysis that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors." *Id.* Such an analysis is required

where there is, as here, "no irreconcilable conflict" with federal regulation in the field. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). Citing *Silver*, this Court has stated:

> [T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'
>
> *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware, supra*, 414 U.S. at 127.

The Court of Appeals, erred, however, in determining that the Illinois Act "unduly hindered" tender offers when the record was devoid of any actual effect the Illinois Act had had on tender offers, 633 F.2d at 497.

If this Court were to agree that certain provisions of the Illinois Act are in conflict with the federal regulatory scheme, the extent of the conflict must be determined to preserve those portions of the states' statutory schemes that are not in conflict with federal law. In *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court struck down in part and upheld in part a Washington statute regulating the design, size and movement of oil tankers on Puget Sound. It is urged that in the instant case, the Illinois Act must be similarly analyzed and those portions of the statute that are not in direct conflict with the Williams Act be preserved. *See, Merrill Lynch, Pierce, Fenner & Smith* v. *Ware, supra.*

Without conceding the invalidity of any of the provisions of the New York Security Takeover Disclosure Act, any more than any of the provisions of the Illinois Act, the State of New York recently amended its Act to avoid possible constitutional challenges while still affording shareholders the benefits of state regulation.* Six other

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* See discussion at pgs. 2-3, *supra*, L. 1980 ch. 733.

states have similarly amended their tender offer laws by statute or regulation.*

As amended, the New York Act charges the New York Attorney General with determining, upon commencement of a tender offer (as under the Williams Act) rather than 20 days prior to commencement, whether the offeror has provided full and fair disclosure to offerees of all material information concerning the takeover bid. The Attorney General may schedule a public hearing or order an investigation and in conjunction therewith, issue an order prohibiting an offeror from purchasing or paying for any shares tendered. N.Y.B.C.L. §§ 1604, 1605(a) (McKinney's). Prohibiting the purchase or payment for shares tendered, as opposed to prohibiting the continuation of the takeover bid, made the New York Act consistent with federal practice where the approval of a takeover is required by a federal regulatory authority, such as the Civil Aeronautics Board.** Even such prohibition, however, may not extend past fifty-five days after the filing of the registration statement N.Y.B.C.L. § 1605(a). This fifty-five day limitation was added to the New York Act in 1980 as a specific response to the claim that state tender offer statutes are used as instruments to indefinitely delay and defeat takeover bids. Fifty-five days was found to be the average number of days between the commencement and completion of a takeover bid.

The New York experience illustrates how state regulations can be harmonized with the federal regulatory scheme of the Williams Act so as to enhance and complement it in the interest of greater protection of shareholders.

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* Conn. Pub. Act No. 81-121 Amending ch. 661a of Conn. Gen. Stat.; Idaho Rule 602 A adopted pursuant to Idaho Code ch. 15, Title 30; Ind. Code 23-2-3-1 P.L. 1981, House Enrolled Act, No. 2067; Md. House Bill 1310, effective July 1, 1981; Nev. Senate Bill 359 ch. 417, NRS 78.3771; ch. 552 Wis. stat. as amended by ch. 16 Laws of 1981, effective June 17, 1981.

** See discussion pgs. 8 to 9, *supra*.

This Court has stated that,

> . . . federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.
>
> *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra* 373 U.S. at 142.

There are no "persuasive reasons" that would lead to the preclusion of the states in the area of regulating tender offers for the securities of corporations within their jurisdiction.

CONCLUSION

The decision of the Court of Appeals should be reversed.

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